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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Appellant,

v.

ALEJANDRO SILVA,

Defendant and Respondent.

B146458

(Los Angeles County
Super. Ct. No. GA028059)

APPEAL from a judgment of the Superior Court for the County of Los Angeles.
Judson W. Morris, Judge. Affirmed.

Steve Cooley, District Attorney of Los Angeles County, Brentford J. Ferreira and
Roberta Schwartz, Deputy District Attorneys for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

SUMMARY

The issue presented on appeal is whether the constitutional prohibition against ex post facto laws precludes the application of amended statutory provisions to a sentencing involving offenses committed before the amendment was enacted. Because the amendment effectively increased the punishment for the offenses, we hold the application of the amended provisions under the circumstances would violate ex post facto principles. Accordingly, we conclude the trial court properly declined to apply the amended statutory provisions in imposing sentence. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

This is the second appeal brought by the People following Alejandro Silva's conviction and sentencing.

1. First appeal after jury verdict and imposition of sentence.

Alejandro Silva was charged with counts of attempted willful, deliberate and premeditated murder and assault with a deadly weapon arising out of a shooting that occurred at a bar. (Pen. Code, § 664/187; § 245, subd. (1)(2).)

The evidence at trial established Silva and Armando Esparza went to a bar on the evening of April 5, 1996. After drinking several beers with a patron named Dave, Esparza became involved in a dispute with another patron, Armando Barrera. Dave handed Esparza a handgun and asked him if he wanted to take care of the problem with Barrera. When Esparza declined to take any action, Silva said he would take care of the problem and took the gun from Esparza. As Barrera left the bar later that evening, Silva approached him and fired the gun five times, wounding him in the stomach and the thigh.

The jury returned verdicts of guilty on both the attempted murder and assault with a deadly weapon counts and found the special premeditation allegation to be true. The trial court granted Silva's motion to dismiss the jury finding that the attempted murder was willful, premeditated and deliberate, and sentenced Silva to 14 years in state prison.

The People appealed from the order dismissing the jury's special premeditation finding. This court concluded sufficient evidence supported the jury finding on the special

allegation, and determined the finding was not contrary to law or evidence. The order granting the motion to dismiss was reversed, and the sentence was vacated. (*People v. Alejandro Silva* (case Nos. B1 14273 and B117139) filed March 3, 1999 [non-pub.])

2. Second appeal following Silva's sentencing.

The case returned to the trial court for sentencing on September 29, 2000 in accordance with this court's decision. After argument concerning the effect of intervening amendments to Penal Code section 654, Silva was sentenced to 17 years in state prison on the assault with a deadly weapon count, and the term imposed for the attempted murder count was stayed under section 654.

The People appeal from the sentence, asserting the trial court imposed an unauthorized term of punishment. The appeal contends the court violated section 654 by staying the greater term for the offense of attempted willful, deliberate and premeditated murder while imposing the lesser term for assault with a deadly weapon.

DISCUSSION

In 1996, when Silva committed the two offenses arising out of the same incident, Penal Code section 654 expressly provided that a defendant could be punished for either offense: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. . . . "In *People v. Norrell* (1996) 13 Cal.4th 1, the Supreme Court rejected a similar prosecution argument that section 654 required the trial court to impose the punishment for the offense that carried the greatest possible sentence in circumstances where multiple offenses arose out of the same incident. (*Id.* at p. 5.) It concluded the trial court had discretion under section 654 to stay punishment for the more serious offense rather than the less serious offense in order to impose a sentence commensurate with a defendant's culpability. (*Ibid.*)

In 1997, in response to the *Norrell* decision, the Legislature amended the Penal Code section 654, effective January 1, 1998, to provide: "(a) An act or omission that is

punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The amendment thus limited the trial court’s discretion under section 654 by requiring the imposition of the greatest term of punishment where a defendant was convicted of multiple offenses arising from the same incident.

The People argue because the 1997 amendment was effective when Silva was sentenced in 2000, the trial court no longer had any discretion to select a lesser term of punishment.¹ We respectfully disagree.

Silva was entitled to be sentenced under the version of Penal Code section 654 in effect in 1996 when the offenses were committed, because application of the section as amended in 1997 would violate the ex post facto clause.² A statute violates the ex post facto clause when its application retroactively “‘increase[s] the punishment for criminal acts.’” (*People v. Frazer*, supra, 21 Cal.4th at p. 756, italics omitted, quoting from *Collins v. Youngblood* (1990) 497 U.S. 37, 43.) For ex post facto purposes, a statute “must apply to events occurring before its enactment.” (*Weaver v. Graham* (1981) 450 U.S. 24, 29.)

The 1997 amendment to section 654 effectively increased the punishment for offenses committed before its enactment by restricting the exercise of judicial discretion at sentencing and requiring the trial court to impose the greatest term of punishment among the available terms. Because the amended statute increased the punishment for the offenses

¹ The People’s appeal asserts only that the trial court lacked authority to exercise discretion under Penal Code section 654. Because the People do not contend the court abused its discretion in imposing a 17-year prison sentence, we do not need to address the issue.

² The United States Constitution bars the passage of ex post facto laws by the federal government (art. I, § 9) and by state governments (art. I, § 10). The California Constitution, article I, section 9 also bars the Legislature from enacting ex post facto laws. Because the ex post facto analysis is identical under both Constitutions, we will refer to the ex post facto clause. (See *People v. Frazer* (1999) 21 Cal. 4th 737, 754, fn. 15.)

Silva committed, the trial court properly applied the version of section 654 in effect when the shooting occurred in 1996. Under the earlier version, the court had the ability to exercise its discretion under *Norrell* to impose a lesser rather than a greater term as to operative term of punishment. Accordingly, the imposition of a lesser term of punishment for the shooting did not constitute an unauthorized term of punishment.³

DISPOSITION

The judgment is affirmed.

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BOLAND, J.*

We concur:

JOHNSON, Acting P.J.

WOODS, J.

³ Since we are not remanding the matter for sentencing, we are not required to address the People's contention it is entitled to sentencing before a different bench officer.

* Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned to Division Seven by the Chief Justice pursuant to article VI, section 6 of the California Constitution.